IN THE

Supreme Court of the United States

October Term, 1961

No. 45

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC.,

Petitioner,

v.

FREDERICK T. GRAY, Attorney General of Virginia, ET. AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR PETITIONER

ROBERT L. CARTER,
20 West 40th Street,
New York 18, New York,
Attorney for Petitioner.

FRANK D. REEVES,
MARIA L. MARCUS,
of Counsel.

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Opinion Below

The opinion of the Supreme Court of Appeals of Virginia (R. 508) is reported at 202 Va. 142, 116 S. E. 2d 55. The opinion of the United States District Court for the Eastern District of Virginia, filed *sub nom N.A.A.C.P.* v. *Patty* (E. D. Va. 1958), which is the same case and with virtually the same evidentiary facts, is reported at 159 F. Supp. 503, vacated and remanded on application of the doctrine of federal abstention, *sub nom Harrison* v. *N.A.A.C.P.*, 360 U. S. 167.

Jurisdiction

The judgment of the Supreme Court of Appeals was entered on September 2, 1960 (R. 534), and petition for rehearing was denied on October 12, 1960 (R. 535). The

petition for writ of certiorari was filed on January 31, 1961, and was granted on March 20, 1961 (R. 537). An order to substitute parties-respondent was entered by this Court on June 19, 1961 (R. 537). Application for an extension of time to file petitioner's brief on the merits to and until September 24, 1961, was granted by this Court on August 14, 1961. This Court has jurisdiction of this cause pursuant to Title 28, United States Code, Section 1257(3).

Question Presented

Whether a statute, which bars petitioner and its local affiliates from underwriting the cost and providing counsel in litigation designed to test the validity of state-imposed racial discrimination on the ground that such activities constitute the unlawful fomenting and solicitation of legal business, and which makes counsel who participate in such cases guilty of malpractice and unprofessional conduct, contravenes the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and abrogates constitutional guarantees of free access to the courts?

Statute Involved

Code of Virginia, 1950, §§ 54-74, 54-78, 54-79:

> 1. That §§ 54-74, 54-78 and 54-79 of the Code of Virginia be amended and reenacted as follows:
>
> § 54-74. (1) Issuance of rule—If the Supreme Court of Appeals, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other

person to show cause why his license to practice law shall not be revoked or suspended.

(2) Judges hearing case.—At the time such rule is issued the court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the chief justice of the Supreme Court of Appeals, who shall designate two judges, other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule, which such two judges shall receive as compensation ten dollars per day and necessary expenses while actually engaged in the performance of their duties, to be paid out of the treasury of the county or city in which such court is held.

(3) Duty of Commonwealth's attorney.—It shall be the duty of the attorney for the Commonwealth for the county or city in which such case is pending to appear at the hearing and prosecute the case.

(4) Action of court.—Upon the hearing, if the defendant be found guilty by the court, his license to practice law in this State shall be revoked, or suspended for such time as the court may prescribe; provided, that the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

(5) Appeal.—The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court of Appeals by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law.

(6) "Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct", as used in this section, shall be construed to include the improper solicitation of any legal or professional business or employment, either directly or indirectly, *or the acceptance of employment, retainer, compensation or costs from any person, partnership, corporation, organization or association with knowledge that such person, partnership, cor-*

poration, organization or association has violated any provision of Article 7 of this chapter, or the failure, without sufficient cause, within a reasonable time after demand, of any attorney at law, to pay over and deliver to the person entitled thereto, any money, security or other property, which has come into his hands as such attorney; *provided, however, that nothing contained in this Article shall be construed to in any way prohibit any attorney from accepting employment to defend any person, partnership, corporation, organization or association accused of violating the provisions of Article 7 of this chapter.*

(7) Representation by counsel.—In any proceedings to revoke or suspend the license of an attorney under this or the preceding section, the defendant shall be entitled to representation by counsel.

§ 54-78. As used in this article:

(1) A "runner" or "capper" is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State *or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability,* in the solicitation or procurement of business for such attorney at law *or for such person, partnership, corporation, organization or association in connection with any judicial proceedings for which such attorney or such person, partnership, corporation, organization or association is employed, retained or compensated.*

The fact that any person, partnership, corporation, organization or association is a party to any judicial proceeding shall not authorize any runner or capper to solicit or procure business for such person, partnership, corporation, organization or association or any attorney at law employed, retained or compensated by such person, partnership, corporation, organization or association.

(2) An "agent" is one who represents another in dealing with a third person or persons.

§ 54-79. It shall be unlawful for any person, corporation, partnership or association to act as a runner or capper *as defined in § 54-78 to solicit any* business for *an attorney at law or such person, partnership, corporation, organization or association*, in and about the State prisons, county jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, police courts, *county* courts, municipal courts, courts *of record*, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever.

2. An emergency exists and this act is in force from its passage.

Statement

1. History of the Case

The above-cited legislation was enacted at the 1956 Extra Session of the General Assembly of Virginia as a part of a so-called plan of "massive resistance" to the elimination of state-imposed racial discrimination required by decisions of this Court. See *N.A.A.C.P.* v. *Patty*, at pages 511-515.

Litigation commenced in this case November 28, 1956, when petitioner filed a complaint in the United States District Court for the Eastern District of Virginia attacking the constitutionality of the instant statute, along with Chapters 31, 32, 35 and 36 of the Acts of the 1956 General Assembly, Extra Session. Chapters 31, 32 and 35 were struck down, but petitioner was advised to seek an authoritative construction of the instant statute and of Chapter 36 in the state courts. *N.A.A.C.P.* v. *Patty, supra.*

Thereupon, on May 20, 1958, the present proceedings were instituted in the Circuit Court of the City of Richmond. Petitioner prayed for a binding adjudication that its activities and those of its local affiliates, in advising Negroes to vindicate their constitutional rights in the courts and in defraying the costs and providing counsel in such litigation, were lawful; that litigants, in seeking, receiving or accepting such assistance, and lawyers, in acting as counsel in litigation supported by petitioner and its local affiliates, were likewise exercising legitimate functions. The complaint prayed for a declaratory judgment that such activities of petitioner, litigants and cooperating attorneys did not violate the statutes aforementioned; or that if these statutes were violated, their enforcement must be enjoined, since the statutes contravened the guarantees of due process and equal protection secured under the Fourteenth Amendment to the Constitution of the United States, and abrogated the constitutionally-secured rights of all persons in the United States to free access to the courts (R. 1-10).

In both the trial court and in the Supreme Court of Appeals below, the aforesaid activities of petitioner, its local affiliates and cooperating attorneys, who functioned as members of the legal staff of the State Conference, were held to constitute fomenting and unlawful solicitation of legal business and to violate basic ethical concepts governing the Virginia Bar—all prohibited by the legislation at issue here.[1] Whereupon, petitioner brought the cause to this Court.

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[1] In the Supreme Court of Appeals (R. 527, *et seq.*), Chapter 36 (Code of 1950, §§ 18.1-394 to 18.1-400) was found to be at war with the state's obligation imposed by the equal protection clause of the Fourteenth Amendment.

2. Germane Facts Concerning Petitioner's Structure and Activities in Virginia

In view of the Court's familiarity with petitioner's aims, purposes and basic organizational structure (see *N.A.A.C.P. v. Alabama*, 357 U. S. 449; *Bates v. Little Rock*, 361 U. S. 516; *Louisiana v. N.A.A.C.P.*, 366 U. S. 293), explication in that regard will be omitted. However, such information may be found in the testimony of Messrs. Banks and Wilkins at pages 250-322 in this record.

There is no dispute or controversy as to the facts. In Virginia, petitioner's local affiliates have formed a state-wide organization called the Virginia State Conference of N.A.A.C.P. Branches (R. 251). That organization has the usual executive officers and a Board of Directors, who serve without salary (R. 251). The Conference employs an Executive Secretary as a full-time paid employee (R. 250). Approximately 15 Virginia attorneys, who are willing to devote a part of their time, effort and professional skill to the elimination of racial discrimination in the state, comprise the legal committee or legal staff of the Conference (R. 48-49, 57-60, 265). These men serve on the committee without compensation, although each attorney, when actually engaged in litigation under N.A.A.C.P. auspices, receives a fixed per diem and expenses (R. 93).

The Conference involves itself in litigation only when racial discrimination is at issue. In some cases, a complainant comes to the Executive Secretary, and if the latter feels the matter is sufficiently meritorious, he refers the person to the Chairman or some other available member of the legal staff. If the Chairman feels that the matter raises a legal issue of racial discrimination which warrants N.A.A.C.P. support, and the President of the Conference acquiesces, support is given. In other cases, direct contact is made with members of the legal staff where N.A.A.C.P. assistance is desired (R. 65, 170). Support consists of the payment of all financial costs incident to the litigation, and

making provision for one or more members of the legal staff to act as counsel for the complainant (R. 19-20, 259-275).

Officials of the N.A.A.C.P. at the national, state and local level make a general practice of advising Negroes of their rights in regard to matters of racial discrimination, and of urging them to contest deprivations thereof in the courts where necessary. It is also common knowledge that petitioner and its local affiliates assist persons, victimized by racial discrimination, in prosecuting the claimed infractions through the courts, with the individual litigant being under no obligation to pay the requisite legal fees or expenses. Moreover, the N.A.A.C.P.'s interest in eliminating racial discrimination is so widely known that many persons come to it seeking assistance because of this knowledge (R. 146, 264).

3. Basic Evidentiary Facts Adduced at the Trials in the State and Federal Courts

A. *Type of Cases Petitioner Will Support* —

The hearing in the state court disclosed that petitioner will support litigation if it constitutes a broad attack against racial segregation *per se* (R. 69, 70, 94, 240); and that legal action at the local level is coordinated through the National Office (R. 216). Essentially the same facts are a part of the record of the hearing in the District Court (R. 263).

B. *Control of Litigation*

While petitioner only underwrites litigation aimed at the elimination of racial segregation, *per se*, once legal action is begun, the organization exercises no further control. When the lawyer-client relationship is established between the litigant and counsel, all action thereafter is taken with the client's consent (R. 207).

This question was explored extensively in the District Court during cross-examination of W. Lester Banks, Executive Secretary of the Virginia State Conference of Branches:

> Q. But within those limitations [i.e., that matter must involve a frontal attack on racial segregation], you leave it entirely to the litigant and the attorney as to the manner in which the litigation is conducted?
>
> A. That is correct.
>
> Q. And the Conference does not interfere?
>
> A. The Conference has nothing to do with the attorney and the litigant." (R. 263).

Roy Wilkins, the Executive Secretary of the Association, testified under cross-examination to the same effect:

> Well, I have heard our lawyers say many times that they could not do anything that the plaintiff does not want done. I have heard them stop in the middle of a case, after they had reached a certain stage, and I have sat in on these conferences that took place on strategy, in which they have said, "Well, before we can go further, we will have to find out what the plaintiff wants to do." (R. 302).

Mr. Robinson, one of the members of the Conference legal staff, stated, "I think it is fair to say that I am, first, the attorney for the litigants who are involved" (R. 411).

C. *Fees and Expenses*

The Virginia State Conference of Branches or petitioner pays the fees and expenses of the attorneys when they are handling a case involving discrimination, supported by the state or the national organization.

In the state court, Oliver Hill, Chairman of the Virginia State Conference legal staff, said "We admit that the State Conference has been sponsoring all this litigation and paying the attorneys' fees. There is no denial of that" (R. 101). A fee of $60 per day is paid to the

attorneys (R. 93) who are almost invariably members of the legal staff. In the District Court, Mr. Banks said "The conference, in situations involving racial discrimination, aids in supplying monies that are used to pay counsel fees and expenses, in litigation of that character . . ." (R. 259). Whatever funds are necessary are paid to the attorney involved; and no money is paid to the litigant (R. 260).

D. *Assistance Not Based On Indigence*

There was testimony in the state court indicating that some of the plaintiffs in the school cases are not indigent. Some were shown to own property or to be gainfully employed (R. 95-173). There is no investigation by the Association of whether plaintiffs have the ability to pay (R. 101), although after the enactment of the present statute, litigants were advised that if this legislation was upheld, they would have to assume financial responsibility for their cases (R. 64).

In the District Court, Mr. Hill stated that he saw nothing wrong with a plaintiff fighting a public problem at his own expense, but that there was nothing wrong with his getting a group to assume the financial obligation involved in such a case, even if the plaintiff had the means to prosecute the matter on his own (R. 338).

E. *Financial Aid Very Rarely, If Ever, Given in Cases Not Handled by N.A.A.C.P. Lawyers*

Testimony in the state court showed that no financial aid was given in cases not handled by attorneys associated with the N.A.A.C.P. (R. 248). In the District Court, it was stated that fees occasionally were paid to lawyers other than those connected with State Conference, but that almost always N.A.A.C.P. attorneys were involved (R. 260, 275).

F. *Authorizations Signed at Meetings of Parents*

The evidence in both trials indicates that a majority of the authorizations given by plaintiffs to attorneys in school desegregation cases were signed at meetings of parents and interested citizens. Such meetings were not called for the purpose of obtaining plaintiffs (R. 296), but were held to disseminate information and to announce the Association's views (R. 295).

In the state court, there was testimony that generally an individual would ask an N.A.A.C.P. attorney to come to his community to speak to a group of parents interested in doing something about school segregation (R. 66). At such meetings the audience would be advised concerning their rights (R. 81-84). Petitions, with space for names of parents or guardians requesting local school boards to comply with their constitutional obligations, would be made available (R. 218), and parents, who wished to do so, were given the opportunity to sign retainers authorizing members of the Conference legal staff to represent them (R. 66, 124, 148). These were signed only if the persons wished to do so (R. 450). No one was kept in the case who desired to withdraw (R. 34, 89, 345). The usual retainer specified that the attorneys were free to associate with whatever other attorneys they saw fit (R. 66). If more than one lawyer in the community was interested in a particular case, all usually would participate (R. 61).

G. *Problems Are Community Wide, Not Individual*

Both records showed that the Association felt that the problems involved and the cases undertaken did not merely concern the plaintiffs, but affected the whole Negro community (R. 79, 338), and that Conference attorneys were representing the entire Negro community in these cases.

H. *Fees Lower Than Lawyers Normally Would Receive*

The fees received were, for the most part, a small and insubstantial part of the Conference attorneys' total income

from their individual practice of law, and the time put into the N.A.A.C.P. cases was far out of proportion to the remuneration received therefor (R. 180, 225-226, 392, 397, 401).

I. *Directives to Branches Re Petitions to School Boards*

A directive was sent to member branches of the Virginia State Conference requesting the branches to organize parents of children of school age and available community resources to petition school boards to desegregate their schools. A sample petition was included. The directive stated that an effort should be made to secure "petitioners who will—if need be—go all the way," since the signing of the petition might be the first step in an extended court fight (R. 218). There was no evidence concerning this directive in the federal court.

J. *The Association Encourages Negroes to Assert Their Rights and Offers Assistance in Civil Rights Litigation*

In the District Court, Mr. Wilkins had stated that the Association offered to assist persons to go to the courts to establish their constitutional right to equality under law (R. 287).

4. Conflicting Conclusions as to the Meaning of These Facts Reached by Federal and State Courts

Except for the directive to the Branches concerning petitioning school boards and specific evidence that some of the plaintiffs in the school cases were owners of real property and were gainfully employed (but testimony in the District Court clearly specified that no effort was made to establish financial ability before offering to render aid), there were no matters of substance disclosed at the state trial which added to, modified or altered the testimony adduced in the United States District Court.

On the basis of these virtually identical evidentiary facts, the state court found that petitioner's activities constituted the illegal fomenting and solicitation of legal business; and that the lawyers who customarily provide professional services in N.A.A.C.P. cases violated basic concepts of professional ethics (R. 532-533).

The District Court, on the other hand, found that petitioner's activities did not amount to solicitation of business or a stirring-up of litigation of the sort condemned by the Bench and Bar, and that Canon 35 of the Canons of Professional Ethics of the American Bar Association condoned petitioner's activities (*N.A.A.C.P.* v. *Patty* at p. 532). While finding the instant statute obscure and difficult to understand, the court said "the general purpose seems to be to hit any organization which participates in a law suit in which it has no financial interest and also to fasten the charge of malpractice upon any lawyer who accepts employment from such an organization. If the statute should be so interpreted as to forbid a continuance of the activities of [petitioner] in respect to litigation as described in this opinion, it would in large measure destroy [the Association's] effectiveness" (*Id.* at p. 534).

Summary of Argument

Petitioner, in aiding Negroes to vindicate their constitutional right to be free of state imposed racial discrimination, is not engaged in activity that threatens the integrity of the judicial process, unless discouragement of litigation is to be regarded as a desirable end in itself. Petitioner, and the attorneys who act as counsel in the civil rights litigation it supports, are merely making use of the court process to test the constitutional validity of various state acts alleged to be racially discriminatory.

The "test" case is an accepted method of settling controversies in the United States, particularly in the field of public law. See *Stark* v. *Wickard*, 321 U. S. 288. Because of the "case or controversy" prerequisite to the exercise of

jurisdiction by American courts, see *Marbury* v. *Madison*, 1 Cranch 137, 165-166; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288; *Evers* v. *Dwyer*, 358 U. S. 202, public officials may engage in activities obviously invalid, and a state may enforce regulations clearly unlawful, until a party with standing to sue challenges the activity or regulations in the courts. This is especially true, when what is done affects an unpopular minority and is in keeping with what the majority accepts as appropriate.

Here, petitioner has engaged in litigation solely for the purpose of helping to improve the status of the Negro in American life. Some of the cases it has supported, *e.g.*, *Smith* v. *Allwright*, 321 U. S. 649; *Shelley* v. *Kraemer*, 334 U. S. 1; *Sweatt* v. *Painter*, 339 U. S. 629; *Brown* v. *Board of Education*, 347 U. S. 483, have become landmark decisions in the development of constitutional law.

Petitioner is a non-profit membership organization, and, therefore, no profit accrues to it or its members. The lawyers involved may gain experience and repute, but very little pecuniary advantage. There is no coercion on persons to be plaintiffs or financial inducement to litigate. It may well be true that many of the people whom petitioner has aided in testing a claimed issue of racial discrimination might not otherwise have brought the law suit. In view of the high and frequently prohibitive cost of litigation, however, the assistance offered by petitioner is an aid not a deterrent to the administration of justice.

The instant statute applies standards respecting the conduct of the legal profession which are so at variance with yardsticks universally accepted as controlling as to deny due process. Cf. *Schware* v. *Board of Bar Examiners*, 352 U. S. 232. Moreover, the effect of the statute is to prohibit petitioner's giving assistance to Negroes to vindicate their constitutional rights to be free of racial discrimi-

nation, while leaving the state free to utilize every available resource to maintain the status quo.

For these reasons, petitioner contends that the legislation denies due process and equal protection of the laws to petitioner, its members, the litigants it aids and cooperating attorneys, and violates constitutional guarantees of Article III of free access to the courts.

ARGUMENT

I

Petitioner Uses the Technique of Test Litigation for the Sole Purpose of Seeking to Obtain Equal Rights and Opportunities, Under Law, for Negro Citizens.

Petitioner's basic aim is to remove all racial barriers to first-class citizenship for Negro Americans in the United States. When petitioner began its operations early in the Twentieth Century, colored citizens had only the weakest and most ineffectual political resources at the national and state level. Indeed, only recently has the Negro gained sufficient viability in the realm of politics to be able to bring to bear enough pressure to secure the enactment of national civil rights legislation designed to insure the right to vote—the first such legislation to pass Congress since Reconstruction.[2] In the South, even today, he still remains largely politically impotent and has little impact on state legislative or executive action. Moreover, until 1954, racial discrimination appeared to have a valid warrant in American constitutional law. Therefore, apparently the most efficacious method to undermine the barriers to racial equality was to strike at their support in the fundamental law.

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[2] Civil Rights Acts of 1957 and 1960: Title 42, United States Code, § 1971 (74 Stat. 90); §§ 1974-1974e (74 Stat. 88); §§ 1975-1975 e (71 Stat. 636); § 1995 (71 Stat. 638).

Illegalities and unconstitutionalities such as racial discrimination may exist with complete impunity until their claimed invalidity is tested in litigation. The activities of petitioner organization has been limited to court action in this category, *e.g.*, *Lane* v. *Wilson*, 307 U. S. 268; *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73; *Smith* v. *Allwright*, 321 U. S. 649 (disenfranchisement based upon race); *Alston* v. *School Board*, 112 F. 2d 993 (C. A. 4, 1940), cert. denied, 311 U. S. 693 (discrimination in respect to teachers' salaries); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (discrimination at the graduate and professional school level); *Brown* v. *Board of Education*, 347 U. S. 483 (discrimination at the grade school level).[3] Indeed it was by virtue of its successful use of the test case technique that petitioner gained national prominence as a civil rights organization. Such "test" cases, *Stark* v. *Wickard*, 321 U. S. 288; *Evers* v. *Dwyer*, 358 U. S. 202, are a necessary product of American jurisprudence, since, with rare exceptions, our courts will exercise jurisdiction only where a "case or controversy" exists between real parties in interest. See *Marbury* v. *Madison*, 1 Cranch 137, 165-166; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324; *Evers* v. *Dwyer*, *supra*.

The net effect of the litigation which petitioner has helped prosecute, some of which was brought to this Court, was the development of constitutional doctrine that governmentally-fostered racial discrimination is impermissible. As in Virginia, the aforementioned litigation was handled

[3] Of course, petitioner has helped fight through the courts a number of criminal cases on behalf of defendants where the issue involved a claimed lack of procedural or substantive due process based upon race, e.g., **Shepherd** v. **Florida**, 341 U. S. 50; **Hill** v. **Texas**, 316 U. S. 400; **Chambers** v. **Florida**, 309 U. S. 227.

by lawyers associated with petitioner organization, and all the necessary court costs, expenses and fees were paid by petitioner and its local affiliates on the theory that determination of the matter involved was in the public interest. The cases are usually class actions, since the issues transcend individual interests, and decision therein affects the whole complex of race relations in this country. It is hard to conceive of this kind of active and imaginative use of the law as a social force to improve the status of colored citizens in the society, being equated with barratry, illegal solicitation of legal business or with activities which are at war with basic concepts of professional ethics.

While it is possible to overstress this fact, it is hardly open to question that without petitioner's use of the court process to test the validity of racial discrimination, some of the most important breaches in the wall of segregation would not as yet have been effected.

II

Petitioner's Activities Neither Constitute Barratry Nor Involve Unprofessional Conduct as Those Terms are Generally Defined.

Barratry has been defined as the unlawful instigation and solicitation of legal business; maintenance as the financing of an action in which the sponsor has no interest; champerty as financing another's cause for a share of the profits. At the time the doctrines of barratry, champerty and maintenance arose, the feudal English lords and large landowners would buy up contested claims against each other or against commoners with whom they had a dispute. The landowners would then bring suit in order to harass and oppress those in possession, in order to increase their holdings. By way of self-defense, a commoner who wished

to secure his title would convey a part of his property to some powerful person, who would use his influence to protect the commoner's interest. The lack of sufficient written conveyances and records, the feudal relationship between lord and vassal and the rudimentary forms of trial—all augmented the power of the landowners to bring false claims and to subvert the independence of judicial tribunals. *Hovey* v. *Hobson*, 51 Maine 62, 64 (1863).

With the fragmentation of many large estates through legal and economic changes and with the development of recording procedures, this category of private warfare between landowners went out of existence. However, the rising merchant class engaged in business practices that occasioned new application of the prohibitions against barratry and champerty. Merchants and lawyers would support claims in which they had no interest in order to obtain a large share of the profits. Lawyers, as the competition in the legal profession grew, would attempt to get fees by soliciting legal business, sometimes employing agents to channel business to them. Radin, "Maintenance by Champerty," 24 *Calif. L. Rev.* 48 (1935). Thus, although the original concepts of barratry and champerty had become obsolete, commercialization now was the evil which threatened to corrupt the legal process.

Completely distinct from profit-making and profit-sharing are acts of charity, *Rice* v. *Farrell*, 129 Conn. 362, 28 A. 2d 7, 9 (1942), and the use of the lawyer's skills in the public interest. See *Thallhime* v. *Brinckerhoff*, 3 Cow 623, 15 Am. Dec. 308 (N. Y. Ct. of Errors 1824). Barratry does not exist where the "sole object is the attainment of public justice or private rights." Laws should be aimed at "prostitution of these remedies to mean and selfish purposes." 139 A.L.R. 623 (1942); see also *Gunnels* v. *Atlanta Bar Association*, 191 Ga. 366, 12 S. E. 2d 602 (1940). This distinction has been stressed in many decisions and in numerous jurisdictions.

In *In re Ades*, 6 F. Supp. 467 (D. C. Md. 1934), for example, where the International Labor Defense employed an attorney to represent defendants it believed to be falsely accused of crime, the court stated at pages 475, 476:

> "... it cannot be laid down as an inflexible maxim that a lawyer may never volunteer his services to a litigant, where the litigant is in need of assistance, or where important issues are involved in the case; and this may be so even though questions of a controversial or political character are at stake. . . . a general statement that one solicited employment without showing that such solicitation was in a dishonorable or disreputable way is not a sufficient charge to justify suspension or disbarment.
>
> * * *
>
> There is no authority for the proposition that a defendant without financial means should be compelled to accept counsel appointed for him by the court, and should be denied the right to avail himself of voluntary services offered by an independent organization."

Again, in a suit by a bondholder's protective committee to determine the validity of bonds, the court held that the offense of barratry had not been committed since there was "nothing in the record to indicate that the purpose of the plaintiff committee was to solicit employment for lawyers." *Royal Oak Drain Dist of Oakland County, Michigan* v. *Keefe*, 87 F. 2d 786, 789 (C. A. 6, 1937).

Another example is *Davies* v. *Stowell*, 78 Wis. 334, 336, 337, 47 N. W. 370, 371 (1890), in which it was stated that barratry or maintenance does not extend to "persons acting in the lawful exercise of their profession, as counsel or attorneys at law." In addition, the court said: "The practical effect of a suit and recovery by one party wronged will inure to the benefit of others similarly situated."

In this case, the federal court (*N.A.A.C.P.* v. *Patty*), in analyzing a companion statute to the one now before

the court, makes the distinction between abuses which constitute barratry and attempts to vindicate the rights of citizens, with particular reference to petitioner organization. There it said at page 532 *et seq*:

> It is manifest . . . that the activities of the plaintiff corporations are not undertaken for profit or for the promotion of ordinary business purposes but, rather, for securing the rights of citizens without any possibility of financial gain. . . . Indeed the exclusion of lawyers when acting for benevolent purposes and charitable societies, as distinguished from business corporations, from the restrictions imposed by the canons of Professional Ethics has long been recognized in the approval given by the courts to services voluntarily offered by members of the bar to persons in need, even when the attorneys have been selected by corporations organized to serve a cause in a controversial field.

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Chapter 35, in failing to recognize this settled rule, violates well-established constitutional principles in its bearing upon the plaintiff corporations. "A state cannot exclude a person from the practice of law or from any other occupation in a manner and for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment". In the first place, the statute obviously violates the equal protection clause, for it forbids the plaintiffs to defray the expenses of racial litigation, while at the same time it legalizes the activities of legal aid societies that serve all needy persons in all sorts of litigation. No argument has been offered to the court to sustain this discrimination. Moreover, Chapter 35 violates the due process clause, for it is designed to put the plaintiff corporations out of business by forbidding them to encourage and assist colored persons to assert rights established by the decisions of the Supreme Court of the United States. The activities of the plaintiffs as they appear in these cases

> do not amount to a solicitation of business or a stirring up of litigation of the sort condemned by the ethical standards of the legal profession. They comprise in substance public instruction of the colored people as to the extent of their rights, recommendation that appeals be made to the courts for relief, offers of assistance in prosecuting the cases when assistance is asked, and the payment of legal expenses for people unable to defend themselves; and the attorneys who have done the work have done so only when authorized by the plaintiffs. The evidence is uncontradicted that the initial steps which have led to the institution and the prosecution of racial suits in Virginia with the assistance of the Association and the Fund have not been taken until the prospective plaintiffs made application to one or the other of the corporations for help. In our opinion the right of the plaintiff corporations to render this assistance cannot be denied.

The activities of petitioner and its local affiliates seem to be covered by Canon 35 of the Canons of Professional Ethics of the American Bar Association, which relates in part to charitable societies rendering aid to the indigent. It makes a distinction between an organization offering this kind of service and a business corporation.

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

Control of the actions of an attorney by a business corporation might mean that the profit-making purpose

of the corporation would override the duty of the attorney in the ethical exercise of his profession. As was said in *In Re Cooperative Law Co.*, 198 N. Y. 479, 485, 92 N. E 15, 16 (1910):

> The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law. The corporation might not have a lawyer among its stockholders, directors, or officers. Its members might be without character, learning or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for the stockholders.

A non-profit corporation, on the other hand, is in an entirely different category. *People ex rel. Hoyne* v. *Grant*, 208 Ill. App. 235, 245 (1918), makes this point.

> Associations not for pecuniary profit, however, are essentially different in their nature; they are organized for the mutual benefit of the members, or for the promotion of the general welfare, or both, and include a multitude of organizations for the advancement of education, science, commerce and industry, and for other beneficient purposes, and, when possessed of a membership of a general character, constitute integrating strands tending to give solidarity to the country in peace and in war.

Thus, associations and corporations not organized for profit cannot be said to control litigation in their own interest. See. Weihofen, "Practice of Law by Non-Pecuniary Corporations: A Social Utility," 2 *U. of Chi.*

L. Rev. 119 (1934); American Bar Association, Opinions of the Committee on Professional Ethics and Grievances, Opinion 282 (1950), at page 594.

Unquestionably, the concern of the Bench and Bar has not been that a corporation cannot take an oath, nor fulfill any of the usual requirements of admission to the Bar. Legal Aid Societies cannot do these things. The problem has been that a business corporation has an ultimate purpose other than the fair outcome of litigation.

It is conceded that petitioner is not a legal aid society in the true sense, in that it does not investigate the financial status of a prospective litigant, nor does it accept every case. Petitioner's activities fall into the same classification, however, since its only purpose in providing legal assistance is to afford access to the courts for those whose rights to equality have been violated, and to serve the ends of justice in the race relations area.

Ryan v. Pennsylvania Ry. Co., 268 Ill. App. 364, 373 (1932), makes a clear distinction between legal aid and unlawful soliciting which bears quotation in this connection:

> After a careful consideration of all the facts we are satisfied that these contentions and arguments are without merit, and we feel impelled to say that the assertion that the Brotherhood, through its legal aid department, is akin to an ambulance chaser and that the petitioner was a beneficiary of an unethical and unlawful system of obtaining clients, is unworthy of the able lawyers that made it. The Brotherhood is a labor organization, composed of men engaged in hazardous occupations and who are banded together for mutual protection and advancement. The evidence established that it organized the legal aid department for the sole purpose of protecting its injured members or their families. . . . The evidence, *introduced by the respondent*, shows clearly the worthy purpose of

> the department and the necessity for its organization and maintenance.

Justification for offering legal assistance is even greater where the questions involved affect equally all the members of a defined group. The American Bar Association, Opinion of the Committee on Professional Ethics and Grievances, Opinion 168 (1937), concluded that it was appropriate for the general counsel of a manufacturer's association to give legal advice to all members of the association on problems common to them all:

> It is our view that such opinions where they are applicable to problems common to all members of the association, are not only proper, but that they serve a highly useful purpose. . . . The giving of advice upon subjects affecting the group is a proper function of a lawyer, protecting its members from prosecution, penalty and loss and at the same time interpreting the law and encouraging its due observance

Moreover, courts and the legal profession have repeatedly approved of legal assistance given by public-spirited attorneys and groups. The American Bar Association, op. cit. *supra*, Opinion 148 (1935), states that as to broad legal questions affecting many groups:

> The question presented, with its implications, involves problems of political, social and economic character that have long since assumed the proportions of national issues, on one side or the other which multitudes of patriotic citizens have aligned themselves. These issues transcend the range of professional ethics.

See in accord: *In Re Ades, supra; Gunnels* v. *Atlanta Bar Assn., supra;* Note, 3 R. Rel. L. Rep. 1257.

Petitioner's attorneys, as is shown on this record, receive far less compensation in affording professional serv-

ices in civil rights litigation than they ordinarily would receive. While the litigant has the opportunity to obtain fundamental rights, there is no money judgment in which the attorney might share. *Williams* v. *Page*, 24 Beav. 654, 666, 53 Eng. Rep. 510 515 (1858), early stated the distinction between the suit which is "substantially that of the attorney, and the client can neither gain nor lose by it," and the one where the attorney's purpose is "an earnest desire to redress the wrong suffered by a poor and uninfluential person."

At present the likelihood of a case brought to harass and oppress is very small. Excellent protection against baseless suits is provided by statutes of limitations, statutes of frauds, by court costs being paid by unsuccessful parties and by establishment of the right to recover damages for malicious prosecution. As summarized by Radin, "Maintenance by Champerty," op. cit. *supra*, at page 77:

> . . . [A]gainst the group of men who harass their neighbors with improper and unnecessary suits, however lawfully commenced, we may set the meek and economically feeble persons who without support are afraid or incapable of calling in the law to secur their rights. The shoe is really on the other foot. If in medieval England, powerful men oppressed their weaker fellow subjects by maintaining suits against them, in modern society powerful people are more likely to achieve their ends by daring their victims to maintain suits.

It is to give opportunity to a weak and disadvantaged group to establish and assert its fundamental rights that petitioner involves itself in test case litigation. It would seem clear, therefore, that measured by prevailing yardsticks, petitioner's activities cannot be said to amount to barratry. Nor are the attorneys, who use their time, energy and professional skill, with a minimum of financial rewards, to achieve the ends of social justice for Negroes, engaged in unprofessional or unethical conduct as those

terms are generally understood by the Bench and Bar in the United States. On the contrary, not only are petitioner's activities and those of the attorneys associated with it condoned by the legal profession, but they are consistent with its highest traditions.

III

The Decision Below Contravenes the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

The State of Virginia may, of course, regulate the practice of law to insure the highest ethical standards. However, as was pointed out under Part I hereof, petitioner's activities represent no threat in that regard. Since the organization pays the attorneys who act as counsel in the cases in which its assistance is given, petitioner's purpose, obviously, cannot be to solicit employment for a group of attorneys. Petitioner is performing a public service in enabling persons to obtain judicial relief, when they would not otherwise be able to vindicate those constitutional rights that affect them individually and as Negroes.

A pecuniary interest is not the only valid "interest" which parties may have in litigation. The "interest" of the members of the N.A.A.C.P. is personal, not pecuniary. The cases in which the organization has participated has affected not only the particular individuals directly involved as plaintiffs, but also the status of Negroes as a group in the society, as well as the pattern of life of a substantial part of the population of this country. The right of a Negro to be free of invidious distinctions of color and to share equally in the benefits and hazards of American citizenship—which is basically all petitioner seeks to accomplish through the technique of the "test" case—are of equal importance to petitioner's members and to Negroes in general.

The Association is, therefore, no stranger to the litigation which it sponsors. Implicit recognition of this fact can be found in the opinion of this Court in *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449. There it was stated at page 459:

> . . . [the N.A.A.C.P.] and its members are in every practical sense identical. The Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies . . ." may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.

Subsequently, *N.A.A.C.P.* v. *Harrison*, 360 U. S. 167, 177 makes renewed reference to this concept:

> . . . Further, the "personal right" component of "direct interest" in the statutory definition of "justified" instigation . . . might lend itself to a construction which would embrace non-party Negro contributors to litigation expense, including N.A.A.C.P. because of the relationship of that organization to its members.

A regulation or statute must necessarily violate equal protection, where it condones legal assistance by one concerned with property rights or commercial interest on the one hand, and prohibits such assistance by one concerned with the elimination of racial differentiations on the other. Yet, as construed, the statute would seem to require this result. In addition, under this law solicitation of legal business as incident to a contractually assumed "pecuniary right" (*e.g.*, by liability insurance carriers) is permitted, but solicitation of legal business to protect a non-party Association member's "direct interest" and "personal right" in litigation is forbidden. This is an invidious differential within the meaning of the decisions of this Court. Cf. *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266; *Skinner* v. *Oklahoma*, 316 U. S. 585; *Morey* v. *Doud*, 354 U. S. 457.

Such a patently arbitrary application of the law can have only one result—viz., the state's being able to marshal all its resources to protect state-imposed segregation, while Negroes, whose constitutional rights are being denied, may no longer utilize the resources offered by petitioner in an attempt to have abstract constitutional rights to equality translated into reality.

It cannot be shown that suppression of petitioner's activities bears any reasonable relation to the end of maintaining the integrity of the judicial process, and the instant statute, therefore, is violative of both due process and equal protection. Cf. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Konigsberg* v. *State Bar of Calif.*, 353 U. S. 252; *Nebbia* v. *New York*, 291 U. S. 502; *Skinner* v. *Oklahoma*, *supra*. This must be so, since discouraging litigation is not an end in itself, especially in a situation where there is no agency except the courts which can be expected to halt a continuing deprivation of constitutional and human rights.

Roscoe Pound, in "Spirit of the Common Law" (1921), traces the origin of this negative attitude towards litigation at pages 134, 135:

> In truth, the idea that litigation is to be discouraged, proper enough, insofar as it refers to amicable adjustment of what ought to be adjusted, has its roots chiefly in the obvious futility of litigation under the conditions of procedure which have obtained in the immediate past. It is much more appropriate to frontier and rural communities where a lawsuit was game and a trial a spectacle than to modern urban communities. Moreover, there is danger that in discouraging litigation we encourage wrongdoing, and it requires very little experience in the legal aid societies in any of our cities to teach us that we have been doing that very thing . . . Under the influence of the theory of natural rights and of the actual equality in pioneer society, American common law assumed that there were no classes and that normally men dealt with one another on equal terms and at arm's length, so that courts at the end of the nineteenth century were loth to admit, if they would admit at all, the validity of legislation

> which recognized the classes that do in fact exist in our industrial society and the inequality in point of fact that may exist in bargainings between them.

Justice Jackson, in "The Struggle for Judicial Supremacy" (1941), at page 306 emphasizes the significance of raising and settling in the courts questions affecting important rights:

> Can we not establish a procedure for determination of substantial constitutional questions at the suit of real parties in interest which will avoid prematurity or advisory opinions on the one hand and also avoid technical doctrines for postponing inevitable decisions? Should we not at least try to lay inevitable constitutional controversies at rest?

These are some of the considerations which render the test case an efficacious and approved method of resolving a controversy in respect to the reach of a guarantee of the fundamental law. See *Evers* v. *Dwyer*, supra; *Stark* v. *Wickard*, supra.

IV.

The Virginia Statute, In Purpose and Intendment, Constitutes Discriminatory Race Legislation Within the Meaning of the Decisions of This Court.

This Court has consistently struck down state regulations based upon a racial criterion. See *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Oyama* v. *California*, 332 U. S. 633; *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410; *Sweatt* v. *Painter*, *supra*; *McLaurin* v. *Oklahoma State Regents*, *supra*; *Brown* v. *Board of Education*, *supra*; *Browder* v. *Gayle*, 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala. 1956); *State Athletic Commission* v. *Dorsey*, 359 U. S. 533, affirming 168 F. Supp. 149 (E. D. La. 1958). It is clear, therefore, that regulation of the legal process in order to discriminate against Negroes as a class is foreclosed, and that such legislation can be sustained only if it furthers a valid state interest. The statute in controversy does not meet this test, since in purpose and effect it

aids in the accomplishment of a racial discrimination proscribed by the Constitution. Cf. *Gomillion* v. *Lightfoot*, 364 U. S. 399.

Many states have statutes which briefly define barratry as the inciting of groundless litigation, with a fine or some other penalty provided.[4] Four others have a more lengthy

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[4]Alabama: Code of Ala., Tit. 46, §§ 44, 53 (1958) [Acts of 1923, Ch. 260, § 6251; Ch. 79, § 3308] § 44—Unlawful to encourage or solicit litigation; § 53—Encouraging litigation; champerty; misdemeanor.

Arizona: Orig. Rev. St. Anno. § 13-261 (1956) [P. C. 1901, §§ 155, 156] Barratry and Maintenance; definition; penalty.

California: Cal. Penal Code §§ 158, 159 (47 Cal. Code 255, 256) [Penal Code of 1872, §§ 158, 159] § 158—Common barratry defined; punishment; § 159—Common barratry: proof required.

Colorado: Colo. Rev. Stat. Ch. 40, Art. 7, §§ 40, 41 (1935) (40-7-40, 40-7-41) [Acts of 1930, §§ 1874, 1875]; § 40—Barratry—penalty; § 41—Maintenance—penalty—exception ["It shall not be maintenance for a man to maintain the suit of his kinsman or servant or poor neighbor out of charity"].

Delaware: Del. Code Anno., Tit. 11, § 371 (1953) [Code of 1852, § 2893]. Barratry, champerty or maintenance. Whoever is guilty of common barratry, maintenance or champerty, shall be fined not less than $50 nor more than $400.

Idaho: Idaho Code Anno. §§ 18-1001, 18-1002 (1948), [Acts of 1887, Title 6, Ch. 7, § 6521]; § 18-1001—Common barratry—["Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months and by fine not exceeding $500"].

Illinois: Ill. Rev. Stat., ch. 38, §§ 65, 66 (1959) [Act of March, 1874]; § 65—Barratry defined; penalty; § 66—Maintenance defined; penalty [same exception as Col., supra].

Indiana: Ann. Ind. Stat., §§ 10-3108, 10-3110, 10-3111 (Burns 1956); [Acts of 1905, Ch. 169, § 510, p. 584]; § 10-3108—Common barrator; definition; penalty; § 10-3110—Unauthorized solicitation by person not admitted to bar—Prima facie evidence; § 10-3111—Unauthorized solicitation—Penalty.

Iowa: Iowa Code Ann., § 740.6 (1960) [Acts of 1860, § 4300]: stirring up quarrels and suits [intent to injure is element]; criminal and civil penalties prescribed.

Kansas: Kansas Gen. Stat. Ann. § 21-745 (1949) [Rev. Stat. 1923] Common barratry; penalty.

Minnesota: Minn. Stat. Ann. § 613.75 (1947) [§ 8267, Rev. Law 1905] Common barratry; definition; misdemeanor.

definition forbidding solicitation of litigation and repre-

Montana: Rev. Codes of Montana, § 94-3533 (1947) [§ 8267, Rev. Code 1907] Common barratry defined—how punished.

Missouri: Mo. Stat. Ann., § 557.470 (Vernon 1953) [R. S. 1825, p. 305, § 75; R. S. 1879, § 1465]; Barratry, how punished.

Nebraska: Neb. Rev. Stat., § 28-716 (1943) [G. S. p. 762: R. S. 1913, § 8732] Stirring up suits and controverises; penalty.

Nevada: Nev. Rev. Stat., § 199.320 (1957) [Acts 1911, § 101]; Inducing lawsuit; penalty.

New York: N. Y. Penal Law, §§ 320-323 (McKinney 1944) [Laws 1881] Penal Code, §§ 132-135); § 320—Common barratry defined; § 321—Barratry a misdemeanor; § 322—Proof required to convict of barratry; § 323—Interest no defense to prosecution for barratry.

North Dakota: N. D. Century Code Ann., §§ 12-17-16, 12-17-17, 12-17-18 (1960) [Penal Code (1877), §§ 191-194]; § 12-17-16—"Common barratry" defined—Punishment; 12-17-17—Proof required for common barratry; § 12-17-18—Common barratry—Accused party to proceeding not a defense.

Ohio: Ohio Rev. Code Ann., § 2917.43 (1953) [Gen. Code (1910), § 12847]; Stirring up lawsuits and quarrels; penalty.

Oklahoma: Okla. Stat. Ann., Tit. 21, §§ 550-553 (1958) [Rev. Laws (1910) §§ 2262-2264]; § 550—Common barratry defined; § 551—Barratry a misdemeanor; § 552—Proof required, barratry; § 553—Interest of accused no defense to barratry prosecution.

Pennsylvania: Pa. Stat. Ann., Tit. 18, § 4306 (Purdon 1945) [Act 1860, March 31, P. L. 382, § 9, was a reenactment of Act 1700, I Sm. L. 6, which was repealed by Act 1860, March 31, P. L. 427, § 79] Barratry defined; penalty.

South Dakota: S. Dak. Code, § 13.1252 (1939) (Rev. Code (1919), §§ 3782-3785) Common barratry defined; misdemeanor; proof required; interest no defense.

Utah: Utah Code Ann., §§ 76-28-43, 76-28-44 (1953) (C. L. 1917), § 8008); 76-28-43 "Common barratry" defined; 76-28-44—Proof required for conviction.

Vermont: Vermont Stat. Ann., Tit. 13, § 701 (1958) [C. L. (1824) Ch. 32, p. 266] Barratry; penalty.

Washington: Wash. Rev. Code, § 9.12.010 (9.1.56) [Acts (1909), Ch. 249, § 118]; Barratry defined; penalty.

Wisconsin: Wisc. Stat. Ann., § 256.295 (West 1957) [Laws, 1927, Ch. 400] § 256.295 Barratry; (1) Soliciting legal business; (2) Solicitation of a retainer for an attorney; (3) Employment by attorney of person to solicit legal matters; (4) Penalty.

sentation in a law suit without a direct interest.[5] In these states, the statutes have been on the books for several decades without substantial amendment. A few other states have statutes specifically directed against the commercialization of the law, forbidding fee-splitting and solicitation of personal injury claims; and forbidding a corporation from representing itself as practicing law and from furnishing attorneys, except corporations organized for benevolent and charitable purposes. These states have no barratry statutes as such.[6]

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[5]Maryland: Md. Ann. Code, Art. 27, §§ 13, 14 (1957) [Laws, 1908, Ch. 413: Laws, 1916, Ch. 695] [Barratry; Practice of law by Corporation] § 13—Generally; solicitation prima facie for gain; disciplinary powers of courts not affected; § 14—Corporation or association not to practice law; liability of officers, etc.; exceptions [" . . . the business of examining and insuring titles to real property, or the collection or adjustment of mercantile claims in which a corporation or voluntary association may be lawfully engaged, nor to any insurance corporation or association defending the insured under a policy of insurance"].

New Mexico: N. Mex. Stat. Ann. §§ 40-26-1, 40-26-2 (1953) (Laws, 1907, Ch. 29, § 1); § 40-26-1—"Barratry" defined; penalty; Disbarment; § 40-26-2—Common barrator; penalty.

Rhode Island: R. I. Gen. Laws Ann. §§ 11-27-8, 11-27-10, 11-27-11, 11-27-14, 11-27-15, 11-27-16, 11-27-17, 11-27-18, 11-27-19 (1956) [P. L. 1935, Ch. 2190, § 1]; § 11-27-8—Solicitation of business by agents prohibited; § 11-27-10—Agreement to furnish legal services prohibited; § 11-27-11—Practices permitted to persons not member of bar; § 11-27-14—Penalties for violation of provisions, supra; § 11-27-15—Practice by corporations and associations prohibited; § 11-27-16—Practices permitted to corporations and associations; § 11-27-17—Penalty for violation by corporation; § 11-27-18—Legal Aid Society of R. I. excepted; § 11-27-19—Enforcement of provisions—duty of atty. gen'l.

Texas: Texas Penal Code Ann. Art. 430 (Vernon 1952) [Acts, 1917, Ch. 133, § 1] Barratry; definition; penalty.

[6]Connecticut: Conn. Stat. Ann., §§ 51-86, 51-87, 51-88 (1960); § 51-86—Soliciting persons to institute actions for damages prohibited; penalty; § 51-87—Solicitation of cases for attor-

After the decision in *Brown* v. *Board of Education*, *supra*, a majority of the southern states amended their barratry statutes, making them specifically applicable to

neys prohibited; penalty; § 51-88—Practice of law by persons not attorneys prohibited; penalty.

Kentucky: Ky. Rev. Stat., §§ 372.060; 372.090; 372.100, 372.120 (July 1960); 372.060—Champertous contracts and conveyances void; § 372.090—Champertous contract a defense in favor of adverse holder; 372.100—Parties to champertous contract may be required to testify; immunity from prosecution; 372.120—No right of action on champertous contract.

Louisiana: La. Rev. Stat. Ann., Tit. 37, § 213 (West 1951)—Persons entitled to practice law; penalty for unlawful practice [specifically applicable to corporation or voluntary association with exception, as follows: "This section does not prevent any corporation or voluntary association formed for benevolent or charitable purposes and recognized by law, from furnishing an attorney-at-law to give free assistance to persons without means"].

Maine: Maine Rev. Stat. Ch. 135, § 18 (1954) Corrupt agreements by attorneys and others.

Michigan: Mich. Stat. Ann., §§ 27.87-27.93 (1938); § 27.87—Purchase of choses in action for purpose of suit—unlawfulness; § 27.88—Same; penalty—disbarment; § 27.89—Same—lawfulness; § 27.90—Same—notice of defense in suit on chose; § 27.91—Same—examination of plaintiff and attorney; § 27.92—Same—nonsuit; § 27-93—Same—immunity of attorney from criminal prosecution.

Massachusetts: Mass. Ann. Laws, Ch. 220, § 8 (1955) Attorneys, etc., Not to Buy, etc., Demands for Collection.

New Hampshire: N. H. Rev. Stat. Ann. § 311:11 (1955) Practice by Corporations Prohibited.

New Jersey: N. J. Stat. Ann., Tit. 2A, §§ 170-78, 170-79, 170-81, 170-82 (1953); § 170-78—Practice of law limited to licensed attorneys or counselors at law—corp. prohibited; § 170-79—Prohibits representation, solicitation, etc., by corp. or other person not atty; § 170-81—Business and practices excepted; § 170-82—Further exceptions, held to prohibit: ["c. Any organization, either corporate or otherwise, organized for or doing charitable or benevolent work or rendering assistance to persons without means in pursuit of any legal remedy, from carrying out such charitable objects, or from rendering such charitable assistance; or d. Any person or

attorneys connected with an organization such as petitioner's which represents litigants without charge. Among these states are the following:

Arkansas, in 1958, amended Ark. Stat. Ann., §§ 47-701, 41-702 (1947), dealing with barratry, by adding eleven new sections (§§ 41-703 through 41-713, Supp. 1959). While the previous law provided a penalty for one who disturbs the peace and spreads false rumors, the new law makes criminal the commission of an act which tends to breach the peace when the purpose is court action. Also condemned is the seeking out and proposing to another that legal action be instituted against a person, state or legal entity; paying the obligations of a party to such an action; bringing or maintaining suit without a direct and substantial interest in the relief thereby sought; or directly or indirectly giving money or something of value to induce another to commence or prosecute a law suit. A corporation or association found guilty will be ousted from the state, and barratry may be enjoined by any interested person. These statutes seem to be patterned after Virginia's enactments in 1956.

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corporation from soliciting the aid, assistance or cooperation of other persons or corporations, similarly situated with regard to pending, proposed, contemplated or threatened litigation"].

North Carolina: N. C. Gen. Stat., § 84-38 (1958) Solicitation of retainer or contract for legal services prohibited; division of fees; misdemeanor.

Oregon: Ore. Rev. Stat., §§ 9.500, 9.510, 9.520, 9.530 (1955); § 9.500—Solicitation of personal injury business by nonlawyer prohibited; § 9.510—Same by lawyer, prohibited; § 9.520—Acceptance and prosecution of solicited claims prohibited; § 9.530—Disbarment for solicitation.

West Virginia: W. Va. Code Ann., § 2854, Practice by corporations or voluntary associations; penalties; limitations of section [not applicable to . . . "organizations organized for benevolent or charitable purposes or for the purpose of assisting persons without means in the pursuit of any civil remedy"].

Wyoming: Wyoming Stat. Ann., §§ 6-195, 6-196 (1957); § 6-195—Solicitation of claims for personal injuries prohibited; § 6-196—Penalties for violation of preceding section.

Florida had no barratry statute until 1959, when it passed Chapter 59-381, Laws of Florida, 1959, and Chapter 59-391 (Fla. Stat. Ann., §§ 877.01, 877.02, 1960 Supp.). These laws forbid instigation of litigation and solicitation of legal services, with an exception for commercial enterprises and legal aid societies.

Georgia had several statutes forbidding barratry, attorneys soliciting business, and a corporation soliciting business.[7] In 1957, it enacted Acts 1957, pp. 658, 659 (Ga. Code Ann., §§ 26-4703 to 26-705, 1958 Supp.), which forbids a stirring up of a quarrel between an individual and the state, acts breaching the peace intending to lead to a suit, and seeking out and proposing a suit to another.

Mississippi had no statutory prohibition against barratry, but in 1956, it enacted Laws 1956, Ch. 253, §§ 1-8 (Miss. Code 1942 Ann., §§ 2049-01.-2049.-08. (1956)), forbidding an association or corporation from giving assistance to induce another to commence a legal action. Commercial enterprises were excepted.

Prior to 1954, South Carolina by statute forbade the solicitation of legal business.[8] In 1957, a new provision was enacted (S. C. Code, §§ 56-147 to 56-147.6 (1952), 1960 Cum. Supp.), making unlawful the inciting of a suit without a substantial interest and with intent to harass or combined with giving payment or anything of value directly or indirectly to another to induce his bringing the law suit. Ouster of a corporation or association and the disbarment of any attorney are provided as penalties for violating this law.

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[7] Ga. Code Ann. 9-9901 (from Acts 1895, p. 64); §§ 9-402, 9-405 (from Acts 1931, pp. 191, 192); and § 26-4701 (from P. C. 1933, §§ 330 and 332).

[8] S. C. Code, 56-145 (1952) (from Acts 1946, (44) 2575.

Tennessee, in 1957, amended Tenn. Code Ann., § 3212 (1955) which simply provided a penalty for inciting litigation—the law since 1932. The new amendment forbids instigation of a law suit by someone not related to the plaintiff by blood or marriage, makes unlawful the aiding or abetting of a barrator, allows an injunction against a barrator and excepts commercial transactions and legal aid societies (Tenn. Code Ann., §§ 39-3405 through 39-3410 (1961) Cum. Supp.).

Virginia is the seventh of these southern states to enact or amend its barratry statutes since 1964. The instant statute and §§ 18.1-388 to 18.1-393, Code of 1950 (1960 Supp.), which was the prototype for the Tennessee statute above cited, provide penalties for organizations such as petitioner's aiding others in bringing law suits and subject attorneys in such litigation to disbarment.

As was pointed out in *N.A.A.C.P.* v. *Patty*, at pages 511-515, these changes in the law did not arise from any valid state concern with the integrity of the judicial process, but were enacted as aids to the state in the accomplishment of its unconstitutional purpose of maintaining racial segregation. The pernicious effect of these laws is to prevent those interested in lawful progress towards desegregation from availing themselves of the services of attorneys which petitioner or any group or association seeking to represent or advance the Negro's interest in this regard might offer. The purpose of these laws was candidly stated in the preamble to the Arkansas statutes which declared that the enactments were designed to prohibit "unnecessary" school litigation. The present statute, petitioner respectfully submits, is in the same category as all other race legislation and, therefore, must fall.

No groups other than those concerned with racial discrimination are at a disadvantage under this legislation. None are prevented from raising sufficient funds to carry on costly litigation. If the object is to safeguard the

administration of justice, discrimination against only those concerned with the invalidity of racial distinctions does not conform to this purpose. Cf. *Morey* v. *Doud, supra.*

Moreover, even in the absence of these considerations, the statute is fatally defective. Since the law endangers petitioner's organizational efforts to remove racial and color distinctions in the United States, it inhibits the effective exercise of rights of freedom of association, protected under the due process clause of the Fourteenth Amendment. See *N.A.A.C.P.* v. *Alabama, supra.* Individual members join the N.A.A.C.P. for mutual protection and for the advancement of a group interest. This right is basic to a democratic society. *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1. Just as a state may not prohibit an individual from asserting his constitutional rights through lawful means, a state may not prohibit this being done in concert with others. *International Union* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 258. Viewed realistically, the decision below denies to petitioner the right to give meaningful assistance to Negroes in their effort to assert and vindicate their constitutional rights. This, petitioner contends, cannot be justified on this record as being reasonably related to any valid legislative objective. Cf. *N.A.A.C.P.* v. *Alabama, supra.*

It is true, of course, that the decision below purportedly leaves petitioner free to underwrite the costs of litigation, as long as the cases it supports are not handled by attorneys associated with the organization. The evil which the statute, as thus construed, was designed to meet, therefore, is that akin to a monopoly or restraint of trade. Violation of the statute under this construction occurs, because only those lawyers on the legal staff of petitioner or its local affiliates handle cases which petitioner finances

as an organization. As was pointed out *ante*, except for the few lawyers who work full time on the petitioner's national office staff, these cases form only a minor part of any attorney's normal practice, and the record clearly shows that the lawyer's financial gain is small indeed. There is no evidence that any interested lawyer cannot become associated with the organization. There is, moreover, no testimony that any person represented through petitioner's resources desired other counsel. As a matter of fact, it is state officials alone who complain—and these officials, it might be added, are invariably stalwart defenders of racial segregation.

Pursuant to decision below, petitioner can no longer utilize the expertise developed over the years by attorneys who have gained experience in civil rights litigation, in active association in petitioner's effort to eradicate racial discrimination. If petitioner can underwrite litigation in which other lawyers act as counsel, the decision, at best, seems to require an inefficient use of the organization's financial resources—and would bar from race discrimination cases those lawyers who appear equipped to do the best job. This hurtful result, rather than insuring high ethical standards, merely hampers effective advocacy.

In *Crandall* v. *Nevada*, 6 Wall. 36, 44, this Court said of the citizens of the United States: ". . . he has a right to free access . . . to the court of justice in the several states, and this right is in its nature independent of the will of any state. . . ." See also, *Terral* v. *Burke Construction Co.*, 257 U. S. 529; *United States* v. *Lancaster*, 44 Fed. 885 (W. D. Ga. 1890); *Truax* v. *Corrigan*, 257 U. S. 312, 334; *Barbier* v. *Connally*, 113 U. S. 27, 21; *Slaughter Houses Cases*, 16 Wall. 36. Petitioner is now engaged in assisting Virginia Negroes to remove racial discrimination in public elementary and secondary schools and in other public facilities. If the decision on review here is affirmed, indi-

vidual Negroes must look to their own resources to finance litigation to achieve this objective, even though the individual litigant might benefit less by a favorable decision than the group as a whole.[9] This places Negroes as a class in Virginia at a further disadvantage.

In the development of the law, opportunities for litigants to obtain needed assistance in the presentation and prosecution of their claims in the courts have expanded.[10] The rules of procedure have been liberalized generally, and specifically in the field of group-sponsored litigation—for example, rules permitting class actions, intervention and permissive joinder. This trend towards greater availability of the court process to the rank and file citizen is regarded as a wholesome one, and one which should be accelerated. The decision below is against this liberalizing trend which has been regarded as an aid to the effective administration of justice. It rests on a dubious rationale and since, in result, it would merely aid the state in the effort to insulate its discriminatory practices from court scrutiny, it cannot be squared with accepted notions of due process.

Conclusion

Group sponsorship of litigation has long been a commonplace (Petition, pp. 17-18), and in the past several decades, it has been utilized with telling effectiveness in the effort to establish and vindicate the Negro's claim to equal citizenship status in the United States. It cannot be possible in a democratic society for group effort, by which great constitutional issue which affect the lives,

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[9] This is especially true in school desegregation litigation. Often the plaintiffs who initiate the litigation do not benefit by elimination of desegregation which ensues.

[10] See Smith, H. R. "Justice and the Poor". 3rd Ed. (1924); Brownell, Legal Aid in the United States (1951).

hopes and aspirations of a disadvantaged citizenry are brought to the courts for resolution, to be condemned as subverting the judicial process, or as posing a threat to the integrity of the Bar. Such activities do not constitute barratry. On the contrary, petitioner submits, organizational activities of this character constitute public service on the highest level.

Wherefore, it is respectfully submitted, the decision below should be reversed.

ROBERT L. CARTER,
20 West 40th Street,
New York 18, New York,
Attorney for Petitioner.

FRANK D. REEVES,
MARIA L. MARCUS,
of Counsel.